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**FOCAL COMMUNICATIONS CORPORATION
OF ILLINOIS**

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**Petition for Arbitration Pursuant to
Section 252(b) of the Telecommunications
Act of 1996 to Establish an Interconnection
Agreement with Illinois Bell Telephone
Company d/b/a Ameritech Illinois**

Docket 00-0027

**AMERITECH ILLINOIS' RESPONSE TO
FOCAL'S PETITION FOR ARBITRATION**

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Introduction

Illinois Bell Telephone Company d/b/a Ameritech Illinois (“Ameritech Illinois”), pursuant to section 252(b)(3) of the Telecommunications Act of 1996 (“1996 Act” or “Act”), hereby responds to Focal Communications Corporation of Illinois’ (“Focal”) Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois (“Petition”).

This Response sets forth the Issues and Focal Positions, quoted verbatim from the Petition, and, for each issue, a short statement of Ameritech Illinois’ position and an initial statement of the basis for that position. Where an issue set forth for arbitration in Focal’s Petition has since been resolved, the Response so states.

Submitted herewith as Appendix A is Ameritech Illinois’ proposed interconnection agreement with Focal (“Ameritech Proposal”), reflecting (i) language on which the parties have agreed and (ii) Ameritech Illinois’ position with respect to the issues to be arbitrated. As the parties continue to negotiate and the arbitration proceeds, Ameritech Illinois may submit a modified proposed agreement.

Also submitted herewith are the Verified Statements of Dr. Debra Aron, Dr. Kent Currie, Patricia Fleck, Salvatore Fioretti, Dr. Robert Harris and Eric Panfil.

Ameritech Illinois sets forth no issue for arbitration in this Response. Accordingly, the only matters that are subject to arbitration in this proceeding are the issues set forth in Focal’s Petition, See 47 U.S.C. § 252(b)(4)(A).

Issue 1: Focal and Ameritech were unable to agree upon the rate to be paid for reciprocal compensation. [Section 4.7 of the Interconnection Agreement]

Focal Position:

Reciprocal compensation should be paid on the transport and termination of all local calls at a cost-based rate. Ameritech should pay Focal a single rate any time Ameritech delivers traffic to Focal's point of interconnection. Focal should pay Ameritech that same rate when Focal delivers traffic to Ameritech's point of interconnection. Focal's switch provides the same (if not greater) geographic coverage as Ameritech's end office and tandem switches provide in combination. Accordingly, the reciprocal compensation rate should be the "tandem" rate and should include at least the following rate elements: end office local termination, tandem switching, tandem transport termination and tandem transport facility mileage.

Ameritech Illinois Position:

Focal should not receive the rate for either the tandem or transport elements of termination unless the following conditions are satisfied: (i) Focal proves that its switch currently serves a geographic area comparable to that served by Ameritech Illinois' tandem switch and (ii) Focal proves that its switch performs the same functions on behalf of Ameritech Illinois as Ameritech Illinois' tandem performs. To satisfy the second of those two conditions, Focal must show that (a) it gives Ameritech Illinois the option to connect directly to Focal's end office function and thus to avoid payment of the tandem rate (and perhaps also the transport rate) if it so chooses, and (b) it defines its switch and offers interconnection on a nondiscriminatory basis for both the termination of local traffic by other LECs and the termination of toll traffic by long distance interexchange carriers.

Initial Statement of Basis for Ameritech Illinois Position:

First, it must be understood that Issue 1 concerns only the rate that Focal may charge for the transport and termination of local telecommunications. The separate matter of inter-carrier compensation for delivery of ISP traffic is the subject of Issue 2, discussed below.

The law is clear that Focal is not entitled to charge the tandem or transport elements of termination unless Focal proves that (1) its switch currently serves a geographic area comparable to that served by Ameritech Illinois' tandem switch, and (2) its switch performs the

same functions on behalf of Ameritech Illinois as Ameritech Illinois' tandem performs on behalf of Focal. Focal has not satisfied either of those conditions.

As to the "geographic comparability" requirement, Focal has so far offered no evidence of the geographic distribution of the customers to which it delivers its services nor the volume of traffic that it delivers to the geographic areas it serves. For the reasons set forth in the Verified Statement of Eric Panfil, it is simply not possible to determine whether Focal's switch serves a geographic area comparable to the area served by an Ameritech Illinois tandem without taking into account those distribution and volume factors. Thus, Focal has not carried its burden of proving that it satisfies the geographic comparability requirement.

As to the "functionality requirement," it appears clear that no Focal switch performs the essential function of a tandem switch, *i.e.*, trunk-to-trunk switching. As demonstrated in the Verified Statement of Eric Panfil, Focal has not shown, as it would have to show in order to satisfy this requirement, that (1) Ameritech Illinois may, at its option, connect directly to Focal's end office switch function, and thereby avoid paying Focal the charges for tandem switching (an option that Focal does have when it delivers local traffic to Ameritech Illinois), and (2) Focal defines its switches and applies charges for terminating traffic on a nondiscriminatory basis regardless of the identify of the interconnecting carrier or its designation as a LEC or an interexchange carrier.

Issue 2: Whether Focal should be compensated for calls originating on Ameritech's network and delivered to a Focal ISP customer. [Section 4.7 and Schedule 1.2 of the Interconnection Agreement]

Focal Position:

Focal incurs the same costs for calls originating on the Ameritech network, routed over

the Focal network and delivered to a Focal ISP customer as it does for calls terminated to other end users. Focal should be compensated for these costs at the same rate as it is compensated for non-ISP local calls originating on Ameritech's network and routed to a Focal customer.

Ameritech Illinois Position:

First, the Commission is without jurisdiction to decide Issue 2 in this proceeding. The FCC has ruled as a matter of controlling federal law that ISP traffic is not subject to reciprocal compensation under the 1996 Act because ISP traffic is not local, but interstate. This Commission is not authorized to regulate this interstate traffic, and also is not authorized in this proceeding under the 1996 Act to impose a duty, such as the duty Focal asks it to impose, beyond those contemplated by the Act. If the Commission were to entertain the question of what form of inter-carrier compensation, if any, should apply to ISP traffic, the answer could not rationally be the one that Focal proposes, i.e., compensation at rates equal to reciprocal compensation rates for the transport and termination of local traffic.

Initial Statement of Basis for Ameritech Illinois Position:

I. THE COMMISSION LACKS JURISDICTION TO ADDRESS ISSUE 2.

A. Federal Law Prohibits The Imposition Of Reciprocal Compensation On ISP Traffic.

Focal seeks compensation for delivering Internet traffic to its ISP customers. The reciprocal compensation duty of section 251(b)(5) of the 1996 Act does not apply to this traffic, however, because it is, as a matter of controlling federal law, "non-local interstate traffic" and thus not subject to section 251(b)(5). *Inter-Carrier Compensation for ISP-Bound Traffic*, FCC 99-38, Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 ("*ISP Order*"), ¶ 26 n.87. The question, then, is whether Ameritech Illinois should be required to pay Focal some non-1996 Act form of compensation on ISP traffic, but at the same rates as section 251(b)(5) reciprocal compensation.

The Commission cannot properly entertain that question, for two reasons. First, the 1996

Act does not authorize state commissions acting as arbitrators in section 252(b) proceedings to impose obligations other than those contemplated by the Act. Second, ISP traffic is interstate traffic, and this Commission does not have authority to regulate interstate traffic.

B. The 1996 Act Does Not Authorize State Commissions To Impose Extra-Act Duties in Arbitrations Conducted Under The Act.

The Commission is conducting this proceeding pursuant to section 252(b) of the 1996 Act, and section 252(b) does not empower the Commission to impose an extra-Act compensation duty on ISP traffic — or to impose any other duty beyond those contemplated by the Act, Section 251 establishes all of the substantive interconnection duties that carriers bear under the Act, and section 252 establishes the means by which those duties -and only those duties-are given effect. The Commission's power as arbitrator is to resolve issues concerning the duties imposed by section 251. It is the power to *apply* the law, not to invent it.

That is exactly what the Act says. Section 252(c) directs the arbitrator to resolve open issues in accordance with the requirements of section 251. It does not authorize the arbitrator to impose obligations not present in section 251. Accordingly, the Commission is without jurisdiction in this proceeding to entertain Focal's request for a new, non-statutory form of compensation on ISP traffic.

C. The Commission Lacks Authority To Regulate Interstate Telecommunications.

The Commission cannot entertain Issue 2 for a second reason: ISP traffic is interstate (*ISP Order* ¶ 12), and this Commission may not regulate interstate communications. That authority lies solely with the FCC.

This Commission is a creature of statute, and derives its power from its enabling act. See

People v. *Illinois* Commerce Commission, 298 Ill. App. 3d 483, 699 N.E.2d 218 (2nd Dist. 1998). The Illinois Public Utilities Act (“PUA”), which authorizes the Commission, gives the Commission exclusive power to regulate *intrastate* telecommunications. Section 4-201 of the Act authorizes the Commission to enforce Illinois law “affecting public utilities” (220 ILCS 5/4-201), but section 4-303 of the PUA excludes interstate commerce from that authorization. 220 ILCS 5/4-303. Further, the PUA defines a “Telecommunications carrier” as a provider of “telecommunications services *between points within the State*. 220 ILCS 5/13-202 (emphasis added). Plainly, the Commission’s authority to regulate telecommunications is limited to intrastate telecommunications, and does not extend to ISP or other interstate traffic.

The federal Communications Act itself recognizes that the authority of state commissions is limited to intrastate traffic. Hence it defines “State commission” as “the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to *intrastate* operations of carriers.” 47 U.S.C. §153(41) (emphasis added).

Thus, for this Commission to impose any form of inter-carrier compensation on ISP traffic would exceed not only the Commission’s Congressionally-conferred authority as arbitrator under section 252 of the 1996, but also its State-conferred authority as regulator of intrastate telecommunications.’

¹ In its *ISP Order*, the FCC said that state commissions may, pending adoption of a federal rule in the FCC’s current rulemaking, determine, whether inter-carrier compensation is appropriate for Internet traffic. *ISP Order* ¶¶ 25-27. The FCC did not, however, have any state arbitration decisions before it, and thus had no occasion to consider, and did not consider, either of the jurisdictional limitations discussed above.

II. IF THE COMMISSION DOES ENTERTAIN ISSUE 2, IT SHOULD REQUIRE THE PARTIES TO ABIDE BY THE FCC'S FORTHCOMING RESOLUTION OF THE ISSUE.

Even if the Commission had jurisdiction to decide Issue 2, it would be unwise for the Commission to preempt the ongoing docket in which the FCC is addressing the same issue. In order to avoid inconsistent treatment of ISP traffic from state to state (and possibly even from interconnection agreement to interconnection agreement), the prudent course would be for the Commission to require the parties to compensate each other (or not) for delivering ISP traffic in

The FCC's dictum is neither binding on this Commission nor sufficient to provide the Commission authority to award non-statutory compensation on interstate ISP traffic. The FCC, a creature of statute like this Commission, cannot grant the states authority where Congress gave them none.

The Virginia State Corporation Commission, in the most recent state commission decision on the ISP issue, agrees. It held:

We further conclude that the FCC's Reciprocal Compensation Order, to the extent it intends to confer regulatory jurisdiction, is of dubious validity. The FCC has concluded that ISP-bound traffic is "jurisdictionally mixed and appears to be largely interstate" in nature.

Th[is] Commission is a constitutional agency that derives all of its powers and authority from the [state] Constitution and properly enacted legislative measures. A statement by the FCC does not, per se, grant jurisdiction to this Commission. Thus, even if we could, by chance, respond to the petitions in a manner not inconsistent with the rules the FCC may later adopt [in its current docket on the ISP issue], our ruling might be challenged on jurisdictional grounds by a party dissatisfied with the outcome.

Final Order, *Petition of Starpower Communications, LLC, for Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc., Case Nos. PUC 990023 et al.* (January 24, 2000) (the "Virginia Decision") (Exhibit 1 hereto), at 6-7. The Virginia Decision involved the interpretation of existing agreements rather than the arbitration of new ones, but that distinction has no bearing on the Virginia Commission's reasoning, or on the significance of its decision here.

accordance with the outcome of FCC Docket 99-68 (*In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*), which should be released, at the latest, early in the life of the agreement being arbitrated here.*

This Commission took affirmative steps to urge the FCC to decide the ISP issue. It said, Compensation for inter-carrier transport and termination of ISP-bound traffic should be determined by the FCC in a generic proceeding. The ICC is not prepared at this time to recommend any specific billing arrangements.

Reply Comments of the Illinois Commerce Commission in FCC Docket No. 99-68, April 26, 1999, at 2. Having successfully advocated the generic proceeding that the FCC is now conducting, the Commission should not delve deep into this highly-charged, complex issue only to have its decision supplanted shortly thereafter by the FCC's decision.

The Virginia State Corporation Commission reached precisely that conclusion in its January 21, 2000, decision concerning the ISP issue:

Given the possibility of conflicting results being reached by this Commission and the FCC, we believe the only practical action is for this Commission to decline jurisdiction and allow the parties to present their cases to the FCC. The FCC should be able to give the parties a decision that will be compatible with any future determinations that it might issue. Being unable to determine the FCC's ultimate resolution of these issues, any decision by us would be compatible with such rulings only by coincidence. (*Virginia Decision, supra*, at 6.)

Accordingly, Ameritech Illinois suggests that if the Commission addresses Issue 2, it should require the parties to provide in their agreement that

· the parties will compensate each other (or not) for the delivery of Internet traffic

² No one knows for certain when the FCC will issue its order in the ISP docket. The new Focal/Ameritech Illinois agreement, however, will not go into effect until June, 2000, and it seems highly unlikely that the FCC's order will not be out at least within a few months of then.

to ISP customers in accordance with the FCC's forthcoming decision; and

- if the FCC's decision issues after the Effective Date of the agreement, the parties will apply the decision retroactively to the Effective Date of the agreement, with a true-up to be effected within thirty days after the decision issues.

This is an eminently reasonable way for the Commission to ensure an outcome that is fair to the parties and in harmony with controlling federal law.

III. THERE IS NO RATIONAL BASIS FOR REQUIRING AMERITECH ILLINOIS TO PAY FOCAL FOR DELIVERING INTERSTATE INTERNET TRAFFIC TO ITS ISP CUSTOMERS AT A RATE EQUAL TO THE RATE THE PARTIES PAY EACH OTHER FOR THE TRANSPORT AND TERMINATION OF LOCAL TELECOMMUNICATIONS.

The remainder of our discussion of Issue 2 assumes, *arguendo*, that the Commission decides, contrary to the foregoing, that it has authority to address the question of inter-carrier compensation on ISP traffic and that it should exercise that authority by deciding the question on the merits, rather than providing for the FCC's decision to control. In that scenario, the answer that Focal would propose — compensation at a rate equal to the reciprocal compensation rate the parties pay each other for transport and termination of local telecommunications — is unsupportable.

The ISP reciprocal compensation boondoggle is a disaster, and not just for ILECs. ILECs are injured, of course, because they are made to bear enormous financial burdens in order to finance their competitors. But the consuming public is injured as well, because, among other reasons we discuss below, CLECs are encouraged to maximize the intake of inter-carrier compensation payments rather than to develop new products and to offer quality service to a wide range of customers. The financial dependence of CLECs on inter-carrier compensation for

ISP traffic simply does not bring consumers the benefits of true competition.

A recent order of the Massachusetts Department of Telecommunications and Energy underscores the adverse consequences of the current situation:

‘The unqualified payment of reciprocal compensation for ISP-bound traffic does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition. A loophole, in a word.

* * *

ISP-bound traffic is almost entirely incoming, so it generates significant reciprocal compensation payments from [ILECs] to CLECs, an imbalance which enables CLECs to increase their profits or to offer attractive rates and services to Internet service providers — or to do both. Not surprisingly, ISPs view themselves as beneficiaries of this “competition” and argue fervently in favor of maintaining reciprocal compensation for ISP-bound traffic. However, the benefits gained, through this regulatory distortion, by CLECs, ISPs, and their customers do not make society as a whole better off, because they come artificially at the expense of others.

Where an increase in income results from regulatory anomaly, rather than from greater competitive efficiency in the marketplace, a regulator is well advise[d] to take his thumb off the scale. We do so today. Arguing that we should not correct the distortions created by reciprocal compensation payments because they benefit ISPs and their customers is much like saying that one should not encourage people to quite smoking, and so avoid adverse personal and public health consequences, merely because some members of society make a living growing tobacco. Decisions like this should be driven by concerns for overall societal welfare — and not by concerns for preserving the hothouse environment of an artificial market niche.³

³ DTE 97-116-C, *Complaint of MCI WorldCom, Inc. against New England Telephone Company d/b/a Bell Atlantic — Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996*, Order (May 19, 1999) (the “Massachusetts Internet Order”) (Exhibit 2 hereto), at *15-*17.

We discuss below reasons that it would be a mistake for the Commission to impose inter-carrier compensation on ISP traffic. The Commission should bear in mind, however, that it is Focal, not Ameritech Illinois, that bears the burden on this issue. This is so for two reasons, separate and apart from the fact that Focal is the Petitioner. First, Focal is not asking the Commission for something to which it is entitled under current law. Rather, it is asking the Commission to fashion a duty that is not required by current law. It is Focal's job to persuade the Commission of the merits of its proposal, not Ameritech Illinois' job to persuade the Commission of its flaws. Second, Focal, not Ameritech Illinois, knows best how Focal serves its ISP customers; the efficiencies it can realize by delivering large-volume, one-way traffic to those customers; and other matters that bear on how much, if anything, Focal should be permitted to charge Ameritech Illinois for delivering that traffic. For that reason, too, Focal appropriately bears the burdens of proof and persuasion.

A. Fundamental Economic Principles Hold That Focal Must Recover The Costs It Incurs To Serve Its ISP Customers From Those Customers, Not From Ameritech Illinois.

It is a fundamental principle of economic efficiency that a firm that incurs costs to supply services should recover those costs from the customer that caused them. That way, supplier and customer face correct incentives that lead to efficient behavior

This basic economic principle compels the conclusion that CLECs serving ISPs should recover the costs of serving their ISP customers from those customers, not from other carriers that contribute to the transaction. For *when an ISP customer who is also a local exchange customer of Ameritech Illinois dials up the ISP, he is acting first and foremost as a customer of the ISP*. Ameritech Illinois witness Dr. Robert Harris demonstrates in detail in his Verified

Statement why this is so, and why an economic analysis of ISP traffic leads to the conclusion that there is no economic or policy basis for requiring Ameritech Illinois to defray the costs Focal incurs when it serves its ISP customers. For *when Focal delivers Internet traffic to Focal's ISP customers Focal is serving those customers, not, as Focal would have it, Ameritech Illinois.*

Dr. Harris also explains why the appropriate model for analyzing inter-party compensation for ISP traffic is the access charge model that applies to interexchange toll traffic, not the reciprocal compensation model that applies to local telecommunications. When an end user dials up the Internet, and thereby imposes costs on his local exchange carrier, his ISP and the carrier that serves the ISP, the end user is acting as a customer of the ISP -just as he acts as a customer of an IXC when he makes a long distance call. In both situations, of course, the end user is still a customer of his local exchange carrier, but just as he places the long distance call in his capacity as a customer of the IXC, so he dials up the Internet in his capacity as a customer of the ISP. It is, after all, the ISP (like the IXC in the case of a long distance voice call) that marketed the Internet service to the end user and determined the price, price structure and other terms and conditions under which the customer decided to dial up the Internet.

Moreover, it is the ISP that chooses the manner in which it connects with the local network, the points at which it connects and, by extension, the costs of that connection. Since the ISP makes the decisions that affect the costs of that connection, principles of economic efficiency suggest that the ISP should bear those costs.

Thus, Focal should, in an economically rational world, recover from its ISP customers the costs Focal incurs when it delivers their traffic. And, indeed, that is exactly what would happen if the access charge regime that applies to all other interstate traffic applied to Internet traffic.

The only reason Focal's ISP customers do not pay access charges is that the FCC has exempted them from doing so. By its exemption, the FCC has, for better or for worse, thwarted an economically correct application of the cost causation principle. As a result, if a single LEC provides access service to an ISP, the FCC has determined that the LEC cannot impose per-minute access charges on the ISP and must recover its interstate access costs--or not--from rates it charges the ISP under its local exchange tariff. That principle ought not change when two LECs instead of one are unfortunate enough to be required to provide access services to an ISP with diminished compensation.

In sum, the costs that Focal incurs when it delivers Internet traffic to its ISP customers are caused by the transaction between those ISP customers and *their* customers, the users of the Internet. The costs are not caused by Ameritech Illinois (or by the relationship between Ameritech Illinois and its local exchange customers). Accordingly, Ameritech Illinois should not be required to bear any of those costs.

B. Even If The Commission Concludes There Should Be Some Form Of Compensation For Delivering ISP Traffic, It Should Not Be Reciprocal Compensation At the Rates The Parties Pay Each Other For Transporting And Terminating Local Traffic.

The preceding section demonstrates that there is no basis for requiring Ameritech Illinois to compensate Focal for delivering traffic to Focal's ISP customers. But even if *some* compensation could properly be required, it would not be reciprocal compensation.

Under controlling federal law, Ameritech Illinois cannot be required to pay Focal section 251(b)(5) reciprocal compensation *per se* for delivering Internet traffic. Focal's position, then, is necessarily that policy considerations warrant compensation for delivering ISP traffic at rates that

mirror reciprocal compensation rates. That position, however, rests on the premise that delivering an Internet call to an ISP in the local calling area is the same as terminating a local call and, therefore, that the cost impacts are the same in both cases. In reality, however, the costs of delivering (and originating) ISP traffic are not the same as the costs of terminating (and originating) local traffic.

The FCC, in fact, has already weighed in against pricing structures like that proposed by Focal precisely because of the unique “economic characteristics of this traffic” (*ISP Order* ¶ 29):

[E]fficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures. In particular, **pure minutes-of-use pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic.** For example, flat-rated pricing based on capacity may be more cost-based. Parties also might reasonably agree to **rates that include a separate call set-up charge, coupled with very low per-minute rates.** (*Id.*) (emphases added).

Focal relies heavily on the FCC’s suggestion that there should be *some* form of inter-carrier compensation on ISP traffic, but ignores the FCC’s strong suggestion in the same *ISP Order* that it should not be “pure minutes-of-use” compensation, like the reciprocal compensation structure Focal proposes.

There are compelling reasons for concluding, as the FCC tentatively concluded, that reciprocal compensation is not an appropriate form of inter-carrier compensation for ISP traffic. Holding times for ISP traffic are much longer than for local traffic; whereas the average local call lasts approximately 3 ½ minutes, the average Internet connection is on the order of eight times longer. *See* Verified Statement of Eric Panfil. And as both Mr. Panfil and Dr. Harris discuss, current reciprocal compensation rates were designed for calls that average 3 ½ minutes duration, *i.e.*, local voice calls. Those rates reflect call set-up costs (spread over the 3 ½ minutes) and

costs that continue for the duration of the call. If the same rates were applied to a 26-minute ISP call, the set-up costs would be recovered about seven or eight times. That, no doubt, is why the FCC opined that it would make sense for an inter-carrier compensation rate for ISP traffic to “include a separate call set-up charge, coupled with very low per-minute rates.” (*ISP Order* ¶ 29.)

Second, ISP traffic travels in one direction only, whereas most local customers send and receive calls. Consequently, while the outgo and income of reciprocal compensation payments associated with the average local customer net out, an ISP is a huge one-way generator of reciprocal compensation receipts, while the ISP’s end user customers are (in the aggregate) huge one-way generators of reciprocal compensation obligations.

Moreover, it costs the typical CLEC less to deliver ISP traffic than it costs the CLEC (or Ameritech Illinois) to transport and terminate local traffic. Because ISPs receive so much more traffic than other end users, CLECs can serve them more efficiently and cheaply than the average consumer. New entrants, in particular, have a unique opportunity to achieve cost savings when they serve ISPs because, as they build their networks from scratch, they can place new switches in close proximity to the largest ISPs, or even allow their ISP customers to collocate their equipment in the CLECs’ central offices. Focal, for one, engages in this practice. This enables Focal to save transport costs when it serves those ISPs. CLECs that serve ISPs can also take advantage of new technologies that ‘save switching costs. Indeed, a CLEC can save as much as 40% in switching costs by serving ISPs.

For all of these reasons, there is no defensible rationale for allowing Focal to charge Ameritech Illinois rates that apply to the transport and termination of local traffic when Focal

delivers Internet traffic to its ISP customers.

C. Neither The Letter Nor The Spirit Of The FCC's "Symmetricality Rule" For Reciprocal Compensation Applies To ISP Traffic.

According to section 252(d)(2)(A) of the 1996 Act, the reciprocal compensation rates that Focal charges for terminating local traffic should be based on the "additional costs" that Focal incurs for terminating that traffic. In practice, however, Focal's rates for terminating local traffic are not based on Focal's costs, but on Ameritech Illinois's costs. That arguably stretches the statute out of shape, but it is the law, because the FCC ruled that reciprocal compensation rates for local traffic must be "symmetrical," i.e., the CLEC gets to charge the ILEC's rates. 47 C.F.R. § 51.711.

The FCC's symmetry rule does not apply to ISP traffic because ISP traffic is not local and, as the FCC has held, is therefore not subject the reciprocal compensation provisions of the Act or the FCC's implementing regulations. Indeed, the FCC specifically ruled in its *ISP Order* (at ¶ 26 11.87) that "the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H. of the Commission's rules do not govern inter-carrier compensation for this traffic." The symmetry rule, rule 51.711 is in Section 51, Subpart H, of the Commission's rules and, thus, is indisputably one of the rules that the FCC held does not apply to ISP traffic.

Nonetheless, Focal asks that it be allowed to charge Ameritech Illinois reciprocal compensation on *ISP traffic* based on *Ameritech Illinois's* costs for terminating *local traffic*. In other words, Focal is asking the Commission to import the FCC's dubious symmetry rule into a realm where it does not apply, based on the premise that Ameritech Illinois's costs of

transporting and terminating local traffic are legitimate proxies for Focal's costs of delivering Internet traffic to its ISP customers.

As demonstrated above, Focal's premise is wrong: There are significant differences between terminating local traffic and delivering Internet traffic, and these differences refute Focal's assumption that the costs of the former are a suitable proxy for the costs of the latter. Furthermore, existing reciprocal compensation pricing structures embody a termination rate designed to provide cost recovery for local voice traffic.

The FCC has recognized, *even in a situation where section 251(b)(5) of the 1996 Act applied*, that where the evidence does not affirmatively show that the cost of delivering traffic to a particular type of customer mirrors the cost of delivering "regular" local traffic, there is a possibility of arbitrage, and the incumbent's transport and termination costs are *not* a suitable proxy for the costs of delivering traffic to that particular type of customer.

Specifically, the FCC, having concluded in the *First Report and Order* that ILEC termination costs for local traffic should *generally* be used as a proxy for CLEC termination costs for local traffic, held that that symmetry rule did not apply to local traffic terminated by paging providers. The FCC reasoned (§§ 1092-93):

[W]ith respect to interconnection between LECs and paging providers, there should be an exception to our rule that states must establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic. While paging providers are entitled to mutual compensation for the transport and termination of local traffic we believe that incumbent LECs' forward-looking costs may not be reasonable proxies for the costs of paging providers. Paging is typically a significantly different service than wireline or wireless voice service and uses different types and amounts of equipment and facilities. In addition, most calls terminated by paging companies are brief (averaging 15 seconds) in duration and contain no voice message, but only an alpha-numeric message of a few characters. *Using*

incumbent LEC's costs for termination of traffic as a proxy for paging providers' costs, when the LECs' costs are likely higher than paging providers' cost, might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation. (Emphasis added.)

Given the lack of information in the record concerning paging providers' costs to terminate local traffic, we have decided to initiate a further proceeding to try to determine what an appropriate proxy for paging costs would be and, if necessary, to set a specific paging default proxy. In the interim, however, we direct states, when arbitrating disputes under section 252(d)(2), to establish rates for the termination of traffic by paging providers based on the forward-looking economic costs of such termination to the paging provider. The paging provider seeking termination fees must prove to the state commission the costs of terminating local calls. Given the lack of information in the record concerning paging providers' costs, we further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching. There are no such estimates with respect to paging in the record, and as discussed above, we find that estimates of LEC costs may not reflect paging providers' costs.

In short, the FCC ruled that the symmetry rule does not apply *even to a class of local traffic* when (i) the characteristics of that traffic call into question the presumption that the ILEC's costs are a good proxy for the CLEC's costs, and (ii) there is a "lack of information in the record concerning [the CLEC's] costs." Applying that analysis here, it would be unthinkable to apply the symmetry rule to ISP traffic. In the first place, ISP traffic, unlike paging traffic, is not local, so the question here is whether to *extend* the rule beyond its normal bounds in the face of an FCC analysis that says the rule does not apply even within its normal bounds when the circumstances indicate it should not. Moreover, as demonstrated above, the characteristics of ISP traffic do not just call into question the presumption that the ILEC's termination costs are a good proxy for the CLEC's costs of delivering ISP traffic; they positively rebut that presumption. Finally, there will be a total "lack of information in the record" concerning Focal's costs for

delivering ISP traffic, because Focal declines to answer Ameritech Illinois' data requests about those costs. Accordingly, a requirement that Ameritech Illinois pay Focal for delivering ISP traffic at rates based on Ameritech Illinois's costs for transporting and terminating local traffic would be arbitrary, capricious and directly at odds with the very symmetry rule that such a requirement would purport to implement.

D. Focal's Proposal Would Unlawfully Require Ameritech Illinois To Subsidize Focal And Would Disserve Every Pertinent Goal Of The Telecommunications Act of 1996.

As the FCC has observed, any scheme of inter-carrier compensation for ISP traffic should aim to produce "efficient outcomes" – *i.e.*, to "ensur[e] the broadest possible entry of efficient new competitors, eliminat[e] incentives for inefficient entry and irrational pricing schemes, and provid[e] to consumers as rapidly as possible the benefits of competition and emerging technologies." (*ISP Order* ¶¶ 29, 33.)

Focal, though, proposes just the opposite. Reciprocal compensation has been described by the Chairman of one CLEC as a "boondoggle" that retards investment in advanced infrastructure.⁴ Focal's continued pursuit of reciprocal compensation for ISP traffic is not surprising. From Focal's perspective, such a regime is like a broken ATM machine that generates nonstop cash for minimal investment. As one independent industry analyst put it: "No other place in the sector can companies reap as much as a 4000 percent arbitrage for minimal, value-added service. No competitive market, legal or illicit, can generate such gargantuan

⁴ *Communications Daily*, Sept. 17, 1998, *quoting* Chuck McMinn, Chairman of Covad Communications. (Exhibit 3 hereto.)

arbitrage.”⁵

The persistence with which Focal pursues reciprocal compensation for ISP traffic cannot mask the bankruptcy of the arguments it advances in this pursuit. Reciprocal compensation for ISP traffic reduces competition among LECs; fosters inefficient entry; institutionalizes irrational pricing of local exchange and Internet services; and denies consumers the benefits of emerging technologies.

1. Competition, not Inflated Reciprocal Compensation Revenues, Will Promote Efficiency.

Focal claims that all it wants is to be compensated for the costs it incurs when it delivers Internet traffic to its ISP customers, but will argue nonetheless that the compensation scheme it seeks should mirror the current reciprocal compensation regime. Those two propositions cannot be squared. As discussed above, CLECs can take advantage of a number of cost-savings when they serve an ISP — cost savings that are not available when they terminate local traffic. These savings permit them to avoid huge transmission costs and to reduce substantially their switching costs. Indeed, under the circumstances, using Ameritech Illinois’s costs of terminating local traffic as a surrogate for CLEC costs of delivering ISP traffic is like using the costs of providing local service in Ashtabula as a basis for estimating the costs of serving Wall Street.

This is not mere speculation. The proof is in the pudding. During the first quarter of 1998, a CLEC called Global NAPs, which serves ISPs, collected \$3.125 million in reciprocal

⁵ “*Reciprocal Compensation for Internet Traffic-Gravy Train Running out of Track,*” Scott C. Cleland, Legg Mason Research Technology Team, June 24, 1998. (Exhibit 4 hereto.)

compensation payments from Bell Atlantic on direct costs of only \$267,000.⁶ If reciprocal compensation merely provided CLECs with cost recovery, how could Global NAPs' reciprocal compensation revenues exceed its total direct costs of doing business by more than twelve-fold?

Even if reciprocal compensation rates bore some relationship to Focal's actual costs, that would hardly warrant a conclusion that reciprocal compensation promotes efficiency. Efficiency, as Dr. Harris explains in his Verified Statement, is driven by competition, not guaranteed cost recovery. In a competitive market, no carrier is guaranteed full cost recovery; only those carriers who can deliver services efficiently are able to recover their costs. While Ameritech Illinois has no doubt that a number of CLECs can and do serve the ISP market at very low cost, it sees no reason why CLECs should enjoy regulatory protection from inefficiency.

The way to promote efficiency in the ISP market is through a regulatory regime that permits meaningful competition among all carriers who seek to deliver traffic to ISPs. Reciprocal compensation — indeed, any inter-carrier compensation regime that remotely resembles reciprocal compensation-effectively precludes such competition. Far from promoting efficiency, it breeds inefficiency.

2. Reciprocal Compensation for ISP Traffic Impedes the Development of Local Competition.

While a reciprocal compensation regime for ISP traffic gives CLECs strong incentives to sign up ISPs, it strips them of any incentive to serve other customers who use dial-up Internet access, including — and especially — residential customers. The reason is simple: if a CLEC

⁶ Comments of Bell Atlantic of Notice of Proposed Rulemaking in FCC Docket No. 99-68 (In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic), at 3 n.2.

provides originating facilities-based local service to ordinary consumers, it not only loses the reciprocal compensation subsidy for ISP traffic, but puts itself at risk of having to pay that subsidy. Thus, as Dr. Harris discusses, Focal's proposal would have the perverse effect of turning customers from assets into liabilities, and discouraging local competition for residential customers.

3. **Reciprocal Compensation Encourages Inefficient Entry and Discourages Efficient Entry.**

Reciprocal compensation for ISP traffic is also inconsistent with the 1996 Act's goals of encouraging efficient entry and reducing incentives for inefficient entry in telecommunications markets. Although ISP-related reciprocal compensation unquestionably draws CLECs to the ISP market, it does so indiscriminately -without regard to whether those CLECs can efficiently serve that market. By enabling CLECs to look to their competitors rather than their customers for full cost recovery (and then some), it obviates the need for CLECs to be efficient. At the same time, it dramatically reduces the opportunity for ILECs that could serve a particular ISP more efficiently to do so.

The only way to spur efficient entry is to allow the competitive process to dictate winners and losers. Reciprocal compensation for ISP traffic co-opts the competitive process. It delivers the entire ISP market to one sector of the local exchange industry, not because that sector is more efficient, but because that sector has unique access to an enormous subsidy that can be used to defray costs and lure ISP customers.

4. **Reciprocal Compensation on ISP Traffic Leads to Irrational Pricing.**

Reciprocal compensation on ISP traffic leads to grossly irrational pricing on every front.

First, it compounds the losses already incurred by LECs that originate ISP traffic. As the Verified Statement of Eric Panfil demonstrates, Ameritech Illinois' costs of originating ISP access exceed its revenues. If Ameritech Illinois were required to pay reciprocal compensation (or reciprocal-like compensation) for ISP traffic, the gap between costs and revenues would widen commensurately. And of course, as Internet use continues to explode, so, too would the gap between Ameritech Illinois' costs and revenues. Thus, even if the compensation rate were reduced, reciprocal compensation would still increase exponentially the losses Ameritech Illinois incurs from the origination of dial-up ISP access. By widening the gap between costs and revenues, ISP-related reciprocal compensation takes an irrational scheme (the ISP access charge exemption) and makes it even more irrational. Indeed, the imposition of reciprocal compensation on ISP traffic (or any other scheme of compensation that would require Ameritech Illinois to incur a net loss for originating such traffic) would constitute a taking without just compensation in violation of the United States Constitution.

Moreover, ISP-related reciprocal compensation breeds irrational pricing schemes for ISP services. Because CLECs recover their costs plus an exorbitant profit from the originating LEC, they are in a position to offer uneconomic discounts or even free access to entice ISP business. Whether or not Focal currently engages in this practice, the fact is that CLECs may even pay the ISP for the privilege of locating a switch in front of the ISP server.

5. For the Commission to Impose Reciprocal Compensation on Internet Traffic Would Violate Section 706 of the 1996 Act Because it Would Discourage Investment in Advanced Services.

Because ISP-related reciprocal compensation is available only on dial-up ISP traffic, it reduces the incentives of CLECs and their ISP customers to deploy advanced network

capabilities, such as xDSL services. With reciprocal compensation offering ISPs the opportunity to receive subsidized access service from a CLEC, why would an ISP risk forfeiting that subsidy by moving to xDSL or other advanced services to connect to its customers? For this Commission to accept Focal's invitation to declare non-local traffic local for purposes of reciprocal compensation would, therefore, violate section 706 of the 1996 Act, which provides in pertinent part

[E]ach State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans

E. The Commission Should Set A Compensation Rate Of Zero Por Internet Traffic.

The South Carolina utility commission, considering the question of reciprocal compensation on Internet traffic in a recent arbitration, recognized its responsibility to adhere to the constraints of the 1996 Act and “conclude[d] that ISP-bound traffic is not subject to reciprocal compensation.” Order on Arbitration, *In re Petition of ITC DeltaCom Communications*, No. 1999-259-C, at 64 (S.C. Pub. Serv. Comm’n Oct. 4, 1999) (Exhibit 5 hereto). Because the Commission recognized that “Section 25 1 of the 1996 Act requires that reciprocal compensation be paid for local traffic,” the Commission found “that the 1996 Act imposes no obligation on parties to pay reciprocal compensation on ISP-bound traffic” and correctly refused to impose such an obligation itself. *Id.*

State commissions have likewise rejected Focal's claim that reciprocal compensation is necessary to cover its “costs” of carrying Internet traffic to ISPs, and held that requesting carriers should recover such costs, to the extent they exist, from their ISP customers. The Louisiana

Public Service Commission, in *KMC Telecom, Inc. v. BellSouth Telecommunications, Inc.*, No. U-23839, at 21 (La. Pub. Serv. Comm'n Oct. 13, 1999) (Exhibit 6 hereto), held that the interconnection agreement before it did not provide for reciprocal compensation on Internet traffic, because the agreement was "clear that the parties intended to do nothing more or less than the 1996 Act required," and because "the 1996 Act does not obligate the parties to pay reciprocal compensation for any non-local, interstate traffic."

The CLEC in that case claimed, like Focal here, "that if it does not receive reciprocal compensation for ISP traffic it will be providing a service to [the ILEC] for free and will incur certain uncompensated costs." *Id.* at 23. The commission rejected this claim because of its utter lack of evidentiary support: Like Focal, the CLEC "did not put forth any evidence as to the nature or amount of these costs that [it] claimed would go uncompensated and the Commission refuses to simply take [the CLEC's] word at face value." *Id.* See also Decision and Order, In *re* *Petition of Global NAPs, Inc.*, No. T098070426, at 11 (N.J. Bd. of Pub. Utils., Jul. 12, 1999) ("ISP-bound traffic, as determined by the FCC, is interstate in character and, therefore, in the Board's view is not entitled to reciprocal compensation. * * * We expect that GNI will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries.") (Exhibit 7 hereto).

For all of the reasons set forth above, and in keeping with these decisions, if the Commission decides the question what scheme of inter-carrier compensation should apply to ISP traffic, the correct answer is zero compensation. A zero-compensation rule would recognize the unique economic problems posed by Internet traffic. Because the FCC has exempted ISPs from paying the interstate access charges which they would otherwise be required to pay, both the

originating LEC, and the LEC that delivers the traffic to ISP are left under-compensated.

Although Ameritech Illinois receives local usage charges from its customers, those charges have historically been computed on the basis of the costs of handling normal voice traffic and are predominantly flat- or message-rated, and thus, as demonstrated above, leave Ameritech Illinois under-compensated in light of the long holding times that are characteristic of Internet traffic. Thus, local usage charges, which are intended to contribute to the maintenance of affordable access-line rates, are likely to be below cost with respect to Internet traffic. It makes no sense to make a bad situation worse by requiring the payment of inter-carrier compensation.

Full cost recovery for LECs that carry Internet traffic may simply not be possible in light of the long holding times of Internet calls and the exemption from interstate access charges granted by the FCC. However, in light of the far worse consequences of requiring originating carriers to pay inter-carrier compensation, it would be reasonable for the Commission to restrict both Ameritech Illinois and Focal to the local exchange revenues each receives from its customer (in the case of Ameritech Illinois, the local charges the Internet user pays; in the case of Focal, the local charges the ISP pays). This proposal is competitively neutral as between the two parties.

IV. AMERITECH ILLINOIS RECOGNIZES THAT THE COMMISSION MAY CONCLUDE THAT A PERIOD OF TRANSITION IS IN ORDER.

We have demonstrated that (1) Focal's proposal that current reciprocal compensation rates should apply to delivery of ISP traffic is untenable, and (2) the appropriate rate of compensation for such traffic is zero. Ameritech Illinois recognizes, however, that the Commission may believe that a transition is necessary for the implementation of this policy.

Accordingly, but without waiving its right to challenge an arbitration award that provides for any inter-carrier compensation on ISP traffic, Ameritech Illinois offers the following transition plan for the Commission's consideration, in that event:

- (1) As of the Effective Date of the parties' agreement, and for a period of three months thereafter, the parties would compensate each other at the rate of \$.001333 per minute for the delivery of Internet traffic to each other's ISP customers. The basis for this rate is set forth in the Verified Statement of Eric Panfil.
- (2) The rate would be reduced to zero over a period of one year. After the initial three-month period at \$.0013333 per minute, the rate would be reduced to 75% of that rate for months 4-6; to 50% for months 7-9; to 25% for months 10-12; and to zero thereafter. See Panfil Statement.
- (3) Each party's payment to the other for delivery of ISP traffic originated by a particular end user customer of the paying party would be capped at one-half of the local usage revenues that the paying party derives from that customer. (See Panfil Statement.)

Issue 3: Focal and Ameritech were unable to agree upon the terms and conditions under which Focal would be able to convert existing customer access circuits into a UNE combination which is sometimes referred to as Enhanced Extended Link ("EEL"), as well as the conditions under which Focal can purchase customer access circuits combined with inter-office transport. [Schedule 9.2 of the Interconnection Agreement]

Focal Position:

Loop/transport combinations which are currently provided via customer access circuits priced at special access rates should be provided as the UNE combination sometimes referred to as an EEL at TELRIC-based rates pursuant to the UNE Remand Order

because this is an efficient, non-discriminatory, technically feasible manner in which to purchase UNEs. This combination should be offered at cost-based rates, and under nondiscriminatory and reasonable terms and conditions. This combination should be available for both existing customer access circuits and circuits to be provided in the future.

Ameritech Illinois' Position:

Ameritech Illinois will provide pre-existing combinations of loop and dedicated transport network elements at TELRIC-based rates and on non-discriminatory and reasonable terms and conditions, consistent with the requirements of the *UNE Remand Order* and *Supplemental Order*. However, Ameritech Illinois' duty to provide pre-existing loop/transport combinations is subject to several qualifications under federal law, and those qualifications should be reflected in the interconnection agreement.

Initial Statement of Basis for Ameritech Illinois' Position:

Based on FCC Rule 315(b) (47 C.F.R. § 51.315(b)), the *UNE Remand Order* requires Ameritech Illinois to "convert" to a UNE combination loop and transport facilities that previously had been combined by Ameritech Illinois and used to provide a requesting carrier with special access service. *UNE Remand Order*, ¶¶ 480, 486.⁷ Ameritech Illinois will provide such pre-existing loop/transport combinations at the TELRIC-based rates used for UNEs, but its obligation to do so is subject to several qualifications imposed by federal law. Indeed, the obligation to provide convert pre-existing loop/transport combinations from special access service to UNEs is itself an exception to federal law. The FCC found that "IXCs may

⁷ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (rel. Nov. 5, 1999) ("*UNE Remand Order*"). Focal refers to a pre-existing loop/transport combination as an Enhanced Extended Link, or "EEL." The FCC, however, primarily used the term EEL to refer to loop/transport combinations that did *not* already exist in the incumbent LECs network and that would have to be combined by the incumbent LEC. *UNE Remand Order*, ¶¶ 478, 481. Thus, to avoid confusion of terms and concepts, Ameritech Illinois refers to pre-existing loop/transport combinations rather than EELs.

not convert special access services to combination of unbundled loops and transport network elements." *Supplemental Order*, ¶ 4.⁸ The FCC then went on to create a limited exception to this "constraint" in situations where the IXC "uses a combination of loop and transport network elements to provide a significant amount of local exchange service . to a particular customer." *Id.*, (5).

Ameritech Illinois' proposals implement this qualification on the availability of pre-existing loop/transport combinations, as well as other qualifications required by federal law.

1. *Focal must certify that the combination must be used to provide a significant amount of local exchange service, as defined by an objective standard.* The FCC found that pre-existing loop/transport combinations could be purchased as UNEs only if the requesting carrier used the combination to "provide a significant amount of local exchange service to a particular customer." *Id.* Requesting carriers can meet this requirement by "self-certify[ing] that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements." *Id.* at n.9.

Accordingly, Focal must self-certify that the loop/transport combination sought to be converted is being used to provide a significant amount of local exchange service to a particular end-user and will continue to be so used after being converted to UNEs. *Id.*, ¶ 5. The *Supplemental Order*, however, did not define what would constitute a "significant" amount of local exchange service. This puts incumbent LECs in somewhat of a bind. After all, carriers who purchase special access service purportedly are doing so for the purpose of

⁸ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order (rel. Nov. 24, 1999).

providing exchange access service, not local exchange service.

Therefore, to ensure that the requirements of the *Supplemental Order* are met, Ameritech Illinois has defined a “significant amount of local exchange service” as follows:

In order to convert an existing special access service to a pre-existing loop/transport UNE combination, Focal must provide at least one-third of the a particular end-user’s local exchange service, and at least 50% of the DS1 circuits sought to be converted must have at least 5 % of local voice traffic, and the entire DS1 facility must have at least 10% of local voice traffic.

These standards are not onerous and are intended merely to insure that the CLEC is actually providing more than a *de minimis* amount of the particular customer’s local exchange service. Indeed, these are the exact same minimum thresholds proposed in an ex *parte* that the FCC cited approvingly when discussing this very issue in the *Supplemental Order*, ¶ 5 n.9. The requirements also will not impede Focal’s ability to obtain pre-existing loop/transport combinations. Ameritech Illinois’ proposal simply gives some identifiable meaning to the FCC’s term “significant.” If no such specific meaning were attached to that term, the FCC’s requirement would be hollow

2. *In certifying that it provides a “significant” amount of local exchange service to a particular customer, Focal cannot treat Internet traffic as local exchange traffic.* In limiting the availability of pre-existing loop/transport combinations, the FCC specifically required requesting carriers to self-certify that they provide a significant amount of “local exchange service” to a particular customer. In a decision prior to the *Supplemental Order*, of course, the FCC had already determined that because calls to the Internet “do not terminate at the ISP’s local server but continue to the ultimate destination or destinations, specifically at a[n]

Internet web site that is often located in another state,” they are not local. *ZSP Order*, ¶ 12;⁹ *id.*, ¶ 1 (“we conclude that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate”); *id.*, ¶ 18. The FCC confirmed this in a recent decision issued after the *UNE Remand Order* and *Supplemental Order*: “[W]e conclude that typically ISP-bound traffic does not originate and terminate within an exchange and, therefore, does not constitute telephone exchange service within the meaning of the Act.”¹⁰ Being predominantly interstate, Internet traffic cannot be considered local exchange traffic for purposes of determining whether Focal is providing a significant amount of local exchange service to a particular customer.” Focal’s opposition to Ameritech Illinois’ proposal directly conflicts with federal law.

3. *Focal cannot violate federal law and force Ameritech Illinois to combine UNEs by placing sham orders for special access service and then seeking to convert the service to a “pre-existing” loop/transport combination.* This qualification rests on three indisputable facts:

- (1) The obligation to convert special access services to loop/transport combinations is based on FCC Rule 315(b). *UNE Remand Order*, ¶ 480;
- (2) Rule 315(b) applies only to UNEs that were already combined by the incumbent

⁹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Declaratory Ruling, 14 FCC Rcd 3689 (1999) (“*ZSP Order*”).

¹⁰ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 *et al.*, ¶ 16 (rel. Dec. 23, 1999).

¹¹ Focal contends that it cannot agree that Internet traffic is not local exchange traffic for this purpose because that would force it to abandon its position that Internet traffic qualifies for reciprocal compensation under 47 U.S.C. § 251(b)(5). (Starkey Statement at 69). That is not the case. Although Ameritech Illinois strongly disagrees with Focal’s position on reciprocal compensation, that issue is entirely separate from the conversion of pre-existing loop/transport combinations.

LEC. See *id.*, ¶¶ 479-80 (referring to loops that are “in fact connected” to dedicated transport);

- (3) Incumbent LECs have no obligation to combine UNEs on behalf of a requesting carrier. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *rev'd in part and aff'd in part on other grounds sub nom. AT&T Corp. v. FCC*, 119 S. Ct. 721 (1999) (vacating 47 C.F.R. § 51.315(c)-(f), which previously had required incumbents to do such combining).

Given these facts, Focal cannot be allowed to end-run the vacatur of Rules 315(c)-(f) on a going-forward basis by placing sham orders for special access service — thereby forcing Ameritech Illinois to combine a loop and transport facility to provide the service — and then ask to convert that service to UNEs on the theory that it is a pre-existing combination under Rule 315(b). Allowing such conduct would make a mockery of the Eighth Circuit’s vacatur of Rules 315(c)-(f) and open the door for Focal and other carriers to violate the Eighth Circuit’s ruling — which is the binding federal interpretation of the 1996 Act — with impunity.

Accordingly, to comply with both the *UNE Remand Order* and with the Eighth Circuit’s ruling, Focal cannot be allowed to convert to a loop/transport UNE combination any special access services ordered after the release of the *Supplemental Order* on November 24, 1999. This is an appropriate cut-off date because it was the *Supplemental Order* that first defined the limited circumstances in which CLECs could convert existing special access services to a pre-existing loop/transport combination.

4. *Focal must pay applicable termination charges for special access services that are converted to pre-existing loop/transport combinations.* This requirement is specifically authorized by the *UNE Remand Order*: “We note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate

termination penalties required under volume or term contracts. " *VNE Remand Order*, ¶ 486 n.985. Accordingly, Focal's position is contrary to controlling law.

5. Focal *must pay any service ordering and administrative charges associated with converting a loop/transport combination*. Service ordering charges and other non-recurring charges are required for all UNEs, and the rules should be no different here. The process of converting a special access service to a pre-existing loop/transport combination is not as simple as Focal assumes. Indeed, from a record-keeping and operations standpoint, in order to "convert" special access services to a UNE combinations, Ameritech Illinois must "disconnect" the pre-existing service and process a "new" order for the UNE combination. While this process is transparent to the end-user (i.e., there is no physical disconnection of service), it is the only way to ensure that the UNE combinations are accurately recognized in Ameritech Illinois' systems. Thus, although it continues to investigate the issue, Ameritech Illinois' position is that Focal should pay all service ordering and non-recurring charges associated with the underlying loop and dedicated transport UNEs. These charges are set forth in Ameritech Illinois' UNE tariff.

In sum, all of the qualifications of Ameritech Illinois' duty to convert a pre-existing special access service to a pre-existing loop/transport combination are fully supported and required by federal law and existing practice. Focal opposes these qualifications, but each is necessary to ensure that the interconnection agreement fully complies with the letter and spirit of the *UNE Remand Order*, the *Supplemental Order*, and other controlling federal law.

Issue 4: Ameritech has proposed language in Section 4.3.12 of the interconnection agreement which would require Focal to maintain network facilities used to provide local service in the geographic area assigned to the central office code and would make Focal solely responsible for the transport between Ameritech's end office and the Focal point of interconnection in the case of one category of service (Virtual Office Service). [Section 4.3.12 of the Interconnection Agreement]

Focal Position:

The language proposed by Ameritech in Section 4.3.12 would impose additional, unlawful and unreasonable interconnection obligations on Focal that would impair Focal's ability to offer Virtual Office Service. This language should be rejected.

Ameritech Illinois Position:

Focal misstates the issue. The issue here is whether Focal can force Ameritech Illinois to transport traffic to a point of interconnection that is outside the local calling area of the originating caller, *i.e.*, more than 15 miles from the rating point assigned to the NXX of the originating caller. If Focal could force Ameritech Illinois to do so, Ameritech Illinois would effectively be required to subsidize Focal's competing service by providing Focal with free transport. Ameritech Illinois also would be forced into underbilling its own local customers, charging local rates for what are toll calls, and being overbilled by Focal for reciprocal compensation. Ameritech Illinois' proposed contract language prevents such economic and anticompetitive distortion while in no way impeding Focal's ability to offer foreign exchange service, use its NXX codes, or compete on a level playing field with Ameritech Illinois.

Initial Statement of Basis for Ameritech Illinois' Position:

Both Ameritech Illinois and Focal provide foreign exchange ("FX") services to retail customers. Generally speaking, a foreign exchange service allows a customer to obtain an NXX code (the first three digits of a seven-digit telephone number) for a geographic area different from that where the customer is actually located. There are various reasons customers may want to do this. Perhaps the most important is that it allows other people in the geographic area assigned to the same NXX code to reach the FX customer for the price of a local call. For example, a call

from Aurora to downtown Chicago travels more than 15 miles, and thus normally would be a Band C toll call. However, if the recipient of the call in downtown Chicago is an FX customer using the same NXX code as the originating caller in Aurora, the originating caller would only be billed for a local call (because Ameritech Illinois' billing systems recognize an intra-NXX call as a local call). This is particularly attractive to certain businesses that may have only one office but want customers (or employees) across a large geographic area to be able to reach them for the price of a local call.

Both Ameritech Illinois and Focal provide FX services. Focal, however, misstates the real issue here. The problem that requires Ameritech Illinois to propose different contract language is that Focal provides its FX service (called Virtual Office Service) in a manner that imposes significant uncompensated costs on Ameritech Illinois. The key difference between Ameritech Illinois' FX service and Focal's FX service is who bears the costs of transporting a call from an originating caller to an FX customer located outside the geographic area assigned to its NXX code. When a call is originated by an *Ameritech Illinois* local customer and terminated to an *Ameritech Illinois* FX customer, the originating caller is charged for a local call and the FX customer pays a rate for FX service that includes the costs of transport (and sometimes switching) to carry the call from the assigned NXX area to the FX customer's location. In this way, the transport costs are appropriately imposed on the FX customer that benefits from the service and the carrier that assigned the NXX code to that customer.

By contrast, when a call is originated by an Ameritech Illinois local customer and delivered to a *Focal* Virtual Office customer, the originating customer still pays for a local call, but, unless Focal has a point of interconnection ("POI") with Ameritech Illinois somewhere

within the originating caller's local calling area, it is *Ameritech Illinois* that must bear the costs of transport (and, in some cases, switching) to carry the call from the calling party's local calling area to Focal's nearest POI outside that local calling area. Ameritech Illinois has no opportunity to recover these transport costs from Focal or Focal's customer. In addition, because Ameritech Illinois' systems recognize the call as a local call, Ameritech Illinois bills the caller at the fixed rate for a local call (about 5 cents), even if Ameritech Illinois actually transports the call over a distance that would make it a toll call (which has a per-minute rate). This characterization of toll traffic as local traffic also allows Focal to overbill Ameritech Illinois for reciprocal compensation, which is not due on toll calls but is due on calls classified (or misclassified) as local.¹² This result is clearly unfair and forces Ameritech Illinois to subsidize Focal's competing FX services.¹³ The costs of interexchange transport in such a situation should be borne by Focal and/or its Virtual Office customer-not Ameritech Illinois.

To prevent this economic distortion and ensure that transport costs are properly borne by the appropriate carrier, Ameritech Illinois has proposed contract language that would require Focal to maintain a point of interconnection within 15 miles of the rating point of any NXX code

¹² Focal's existing interconnection agreement requires reciprocal compensation on Band A and Band B calls only, not on Band C toll calls. Focal now seeks to revise the definition of "Local Traffic" in Schedule 1.2 of the proposed agreement in a way that would allow it to continue overbilling Ameritech Illinois for reciprocal compensation on calls to Focal's Virtual Office customers. Ameritech Illinois cannot agree with that proposed definition.

¹³ This cost recovery problem does not arise when a call is originated by a Focal local exchange customer and terminated to an Ameritech Illinois FX customer, as Ameritech Illinois offers Focal a POI at each of Ameritech Illinois' switches. Focal therefore can always hand off the call to Ameritech Illinois within the originating local calling area, and thus incurs no uncompensated transport costs. Rather, the costs of interexchange transport are borne by Ameritech Illinois and its FX customer.

that Focal uses to provide FX service:¹⁴

4.3.12. If Requesting Carrier uses an NXX code to provide foreign exchange service to its Customers outside the geographic area assigned to such code, Requesting Carrier shall provide a point of interconnection (POT) within 15 miles of the rating point to which the NXX code is assigned, at which Ameritech may terminate local traffic destined for that NXX code.

A POI needs to be within 15 miles of the rating point for an NXX because calls between central offices that are less than 15 miles apart are considered local, whereas calls transported over a longer distance are Band C toll calls. Thus, if Focal maintains a POI within 15 miles of the rating point of any NXX it uses for FX service, Ameritech Illinois will never have to transport an FX call more than 15 miles, and thus will not have to provide Focal with what amounts to free interexchange transport and switching. Ameritech Illinois also would not have to collect local charges for what are actually toll calls or pay any reciprocal compensation for what are actually toll calls.

Ameritech Illinois' proposal will not impede Focal's provision of Virtual Office service or its ability to use NXX codes as it likes. All Ameritech Illinois' proposal does is ensure that Focal provides its Virtual Office service and uses its NXXs in a competitively neutral and economically fair manner. That is, it ensures that Focal supplies or purchases the necessary facilities or services, rather than obtain a free ride on Ameritech Illinois' facilities, to provide transport outside of the geographic area assigned to an NXX for any Focal FX service using that NXX.

¹⁴ Ameritech Illinois originally proposed broader language to deal with the FX issue. After discussions with Focal and internally, however, Ameritech Illinois has now proposed the quoted language for Section 4.3.12.

Issue 5: Issue 5 has been resolved.”

Issue 6: Issue 6 has been resolved.

Issue 7: **The parties were unable to agree on whether Ameritech is able to change any components of an already-provisioned xDSL loop without Focal’s consent. [Section 9.56 of the Interconnection Agreement]**

Focal Position:

Ameritech should not be able to switch loops or any other component of an already-provisioned xDSL loop without Focal’s consent, since the result may be a degradation of service to Focal’s customer.

Ameritech Illinois Position:

Ameritech Illinois maintains ownership of the network elements it leases to Focal, and is responsible for maintaining them. Focal does not have a right to veto changes to network elements, and giving Focal such a veto would prevent Ameritech Illinois from properly managing and maintaining its network.

Initial Statement of Basis for Ameritech Illinois Position:

Ameritech Illinois changes network elements or their components as part of its ongoing efforts to maintain its network facilities so that end users of all the carriers that use those facilities continue to receive quality service. For example, Ameritech Illinois’ maintenance technicians modify loop components as necessary to repair damaged cable or other facilities; in some cases, a technician might reassign an end user from a defective loop to a spare, undamaged loop in the same group

It would be both improper and impractical to give Focal the right to veto this work. First,

¹⁵ The parties have agreed on contract language that resolves Issue 5 as presented in the Petition. The parties are still discussing pricing with respect to loops that were the subject of Issue 5, but have no open issue in that regard to present to the Commission for resolution in this proceeding.

the network element still belongs to Ameritech Illinois, and Ameritech Illinois still has the obligation to perform maintenance on it. It would be unfair to assign that responsibility to Ameritech Illinois while, at the same time, restricting Ameritech Illinois' rights to do the necessary work.

Second, obtaining Focal's consent would require enormous and costly changes to Ameritech Illinois' procedures, because under current procedures, technicians typically do not know who (if anyone) is leasing the loop they are working on. There are millions of loops in Ameritech Illinois' network, and hundreds of thousands of those loops are being leased to other carriers. As it stands now, when Ameritech Illinois' maintenance personnel repair a loop, they do not know the identity of the carrier using that loop. Nor is that information readily available: Ameritech Illinois' loop inventory systems do not track the identity of the carrier. In order to obtain Focal's consent for repair work, Ameritech Illinois would have to set up a procedure for its technicians out in the field to call in before beginning any work, then have a team of researchers available to figure out whether a loop is being used by another carrier (and if so, which carrier), then have a team of intermediaries on hand to locate the appropriate carrier representative and request, obtain and document that carrier's consent. Thus, every single trip to the field would become a repair job, a research job, and a carrier-liaison job. All the while, repair technicians would be out in the field, waiting for answers, instead of doing the work that serves end users and their carriers alike. Ameritech Illinois has been unable to think of any way to make Focal's proposal work in practice.

Finally, the existing system ensures nondiscriminatory treatment, while Focal's proposal would create the possibility of discrimination-or at least claims of discrimination. Ameritech

Illinois' field personnel are "blind" to the identity of the carrier using the facilities they are working on. It may be Ameritech Illinois, or it may be Focal or another competing carrier leasing the loop as a UNE. Under that system, the field personnel necessarily treat all carriers, including Ameritech Illinois, alike. Under Focal's proposal, on the other hand, Ameritech Illinois field personnel would learn the identity of the carrier using each loop they are working on, and would become susceptible to accusations of discrimination

Issue 8: The parties were unable to agree to the applicability of liquidated damages in the event of Ameritech's failure to timely provision customer access circuits. [Section 24.4 of the Interconnection Agreement]

Focal Position:

Ameritech must be liable for liquidated damages in the event of the untimely provisioning of customer access circuits regardless of whether they are purchased out of Ameritech's tariff.

Ameritech Illinois Position:

Issue 8 cannot lawfully be addressed in this proceeding, because the access services that are the subject of Issue 8 are not within the scope of sections 251 and 252 of the Telecommunications Act of 1996.

Initial Statement of Basis for Ameritech Illinois Position:

Section 252(b) of the 1996 Act authorizes either party to the negotiation of an interconnection agreement to petition the State commission to arbitrate "open issues" in the parties' negotiations. The scope of those negotiations — and thus of the open issues that can be raised in an arbitration petition — is defined by section 252(a) of the Act: "interconnection, services, [and] network elements pursuant to section 251." A requesting carrier cannot toss the kitchen sink into its interconnection negotiations and then ask the State commission to clean

it up in an arbitration. The compulsory negotiations are limited to the matters covered by section 251 of the Act, and the compulsory arbitration is limited to those same matters.

In Issue 8, Focal poses the question whether the parties' interconnection agreement should require Ameritech Illinois to pay Focal liquidated damages if Ameritech Illinois does not meet due dates for provisioning *access services* that Focal buys out of Ameritech Illinois' *access tariff*.¹⁶ These access services are not interconnection, or unbundled network elements, or resale services, or anything else covered by section 2.51 of the Act. That is why the parties' current interconnection agreement does not cover them and why Focal buys them out of the tariff. And it is also why the parties' new interconnection agreement will not cover them and why Focal will continue to buy them out of the tariff,

The question posed in Issue 8 has nothing to do with the matters covered by section 251 of the 1996 Act. Consequently, Focal was not entitled to raise Issue 8 in its Petition under section 252(b) of the Act, and the Commission has no authority to address the matter under section 252(c) of the Act. Issue 8 should be dismissed.

Issue 9: Issue 9 has been resolved.

Issue 10: Issue 10 has been resolved.

Issue 11: Issue 11 has been resolved.

Issue 12: Issue 12 has been resolved.

Issue 13: Issue 13 has been resolved.

¹⁶ Focal's framing of its position on Issue 8 in the Petition may make it appear that only *some* of the purchases in question are tariff purchases. Focal's testimony and proposed contract language, however, make clear that Issue 8 concerns only access services that Focal buys out of Ameritech Illinois' tariff. (See Verified Statement of John Barnicle at 29 *et seq.*)

Issue 14: The parties were unable to reach agreement on intervals for all Network Element Performance Activities. [Section 2.1.4 of Schedule 9.5 and Section B of Schedule 9.10 of the Interconnection Agreement]

Focal Position:

Focal must be able to receive interconnection facilities and UNEs in a timely and reliable manner. This requires that the interconnection agreement contain reasonable, clearly defined and specific provisioning intervals.

Ameritech Illinois Position:

Focal may adopt the provisioning intervals established by this Commission (which are based on “parity”) and the FCC in their respective stipulations approving the SBC-Ameritech merger. Pending Focal’s adoption of the Commission-approved and FCC-approved intervals, Ameritech Illinois has proposed a series of interim provisioning intervals. These intervals recognize that provisioning intervals for certain orders (i.e. particularly large or complex orders) cannot be set in stone this far in advance, but must be set on an individually negotiated basis.

Initial Statement of Basis for Ameritech Illinois Position:

Focal suggests that Ameritech Illinois is trying to evade its performance obligations. This accusation is patently untrue, and surprising to see, considering the amount of time and effort that Ameritech Illinois, this Commission, and the FCC put into designing a comprehensive set of performance and reporting obligations as a condition of the SBC-Ameritech merger. Ameritech Illinois is willing to provision facilities in accordance with the performance intervals established by this Commission and by the FCC in their respective stipulations approving the merger (and according to the agreed-upon timetables for implementation of those stipulations).

Focal’s complaints concern the transitional provisioning intervals that will apply only in the (short) period pending implementation of the stipulated intervals. The terms Focal challenges merely set forth a few eminently sensible limitations (such as providing that the provisioning

intervals for a few large or complex orders will not be set in stone in the Agreement, but determined on a case-by-case basis by negotiation at the time of the order). In any event, Focal itself can render all of its complaints moot simply by opting in to the Commission-approved and FCC-approved provisioning intervals as they take effect.

CONCLUSION

For the reasons set forth above, and as further elaborated and supported in this proceeding, Ameritech Illinois respectfully urges the Commission to rule in its favor on the contested issues and to approve the proposed interconnection agreement submitted herewith.

Dated: February 7, 2000

Respectfully submitted,

AMERITECH ILLINOIS

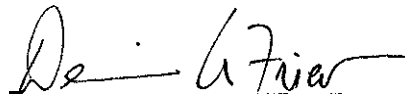
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STATE OF ILLINOIS)
)
COUNTY OF COOK)

VERIFICATION

I, Dennis G. Friedman, do on oath depose and state that the facts contained in the foregoing document are true and correct to the best of my knowledge and belief.



Dennis G. Friedman

Attorney for Illinois Bell Telephone Company
d/b/a Ameritech Illinois

Subscribed and Sworn
to before me this 7th
day of February, 2000.



Notary Public

